



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 507 OF 2014

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION..... CLAIMANT

VERSUS

DIANI SEA RESORT T/A CARSLAKE NOMINEE LIMITED..... RESPONDENT

RULING

1. The Claimant Union filed this Claim on behalf of its Member, Mr. Jeremiah Ouma Onditi. The Member was an Employee of the Respondent Hotel. His contract, was terminated by the Respondent, in circumstances he and his Trade Union feel were unfair and unlawful. The Claimant seeks to have its Member reinstated, or paid terminal dues, and compensation for unfair termination. Parties appeared before the Labour Officer Mombasa County for conciliation. They did not achieve resolution, paving way for the filing of the Claim for adjudication.

2. The Respondent has raised a Preliminary Objection. The Notice was filed on 26th May 2015. The Objection is based on two points. One, it is argued the Claimant Union lacks the legal standing to bring the Claim on behalf of Mr. Onditi. The reason for this being that there is no Recognition Agreement between the Claimant Union and the Respondent Employer. Two, it is argued that Diani Sea Resort is a separate legal entity from Carslake Nominee Limited. The Respondent is improperly sued.

3. The Respondent argues the correct name of the Respondent should be Carslake t/a Diani Sea Resort. On the main objection, the Respondent submits there are no terms contained in an Agreement between the Parties. The Claimant has no standing to bring the Claim in its own name. Representation must be preceded by Recognition. The Claimant Union lacks the capacity to represent the Employee. There is another Trade Union which represents the Hotel Industry.

4. The Claimant replies that it is rightfully representing its Member Mr. Onditi. This was the case at Conciliation, as well as is in Court. Mr. Onditi is a Member of the Claimant Union. The Respondent has been deducting trade union dues from his salary, and remitting to the Claimant. He is entitled to the benefits of Membership, which include legal representation. The law recognizes majority and minority workers' rights. Recognition under Section 54 of the Labour Relations Act 2007 is about majority rights. The Claimant insists the correct Employer has been sued, and appeared in all the proceedings preceding adjudication.

The Court Finds:-

5. Section 54 of the Labour Relations Act requires an Employer to grant Recognition to a Trade Union, once a Trade Union has recruited a simple majority of the Employer's Unionisable Employees. The

purpose of Recognition is not to enable the Trade Union represent its Members in Court or other Dispute Resolution Platforms. Recognition is aimed at giving a Trade Union the sole collective bargaining agency. It is purposed on collective interests and rights.

6. Legal representation of individual Employees in Court and other Dispute Resolution Platforms is an obligation of the Trade Union, imposed by the Trade Union Constitution. It is a right of the Employee, which flows from his individual Membership of a Trade Union, normally guaranteed through the Trade Union Constitution. It is an aspect of the right to associate under the Constitution of Kenya.

7. Section 22 of the Industrial Court Act 2011 grants Trade Union Representatives the right to represent their Members in Court. It was the same under the repealed Section 23 of the Labour Institution Act 2007. Under Section 62 of the Labour Relations Act 2007, trade disputes, including those relating to termination of employment, may be reported to the Minister by or on behalf of the Trade Union, that is a Party to the dispute; and by an authorized Representative of the Trade Union. If the dispute is not resolved after conciliation, it is referred by a Party to the dispute, to the Labour Court under Section 73 of the Labour Relations Act.

8. The Claimant Union took up the dispute with the Minister on behalf of its Member, in accordance with the law. The dispute was initiated in the name of the Trade Union as permitted by the law. There is no merit in the argument by the Respondent that the Claimant Union could not bring the Claim in its own name, or represent the Claimant who is its Member. The law allows the Trade Union to file Claims for its Members, individually or collectively, in its own name, and take responsibility for the outcome of such Claims. This is an important method of affording Workers protection against the vagaries of litigation. They are encouraged to pursue Claims, buffered by the name of their Trade Unions, and never afraid that, Employers may pursue them on costs, and to utter ruination, in event they lose their Employment Claims. It affords Workers an important tool in accessing industrial justice, as is desired through the Article on access to justice in the Constitution of Kenya. For reasons stated in the cases of *Kenya Shoe & Leather Workers Union v. Falcon Turners Ltd [2013] e-KLR* and *Kenya Guards and Allied Workers Union v. Lavington Security Limited [2013] e-KLR* cited by the Claimant, the Court rejects the Respondent's argument on the representation and appearances. The Trade Union has the right to represent its Members in Court, and to bring Claims on the Members' behalf, be it individual Members or a Collectivity of Members, in the Trade Union's Name. This is a cornerstone of the associational freedoms and rights anchored in the Constitution. Recognition of the Trade Union is not a prequalification for legal representation in Court. Recognition is purely aimed at collective bargaining and majoritarian interests and rights. The Claimant Union has been involved with the pursuit of its Member's grievance from the inception of the dispute. It was a Party to Conciliation. It could never be a stranger to the dispute. It owns the dispute.

9. The Claim cannot fail on the ground that the Respondent is misnamed. This Court has on many occasions pointed out that Employees cannot be closed out from pursuing their Claims on the ground that they have given Court the wrong description, of the business and legal structures which constitute their Employers. Employees hardly know what these capacities are, and what the Employers' business and legal structures are. Frequently, Businesses are structured in ways that are meant to avoid regulatory burdens, such as taxes and labour regulations. They have multiple layers of business and legal forms. Employees would be hampered in correcting employment wrongs, if they are expected to sift through these multiple layers before filing of their Claims. The Claimant Union or its Members could have problems knowing if it is Diani Sea Resort t/a Carslake Nominee Limited or Carslake Nominee Limited t/a Diani Sea Resort. These are just different faces of the same Employer. The name has never been in issue from the inception of the dispute at the Ministry level. Where, however, the Advocate acting for an Employer reveals what the correct name of the Employer should be, the consequence of misnaming should not be the rejection of the Claim; it should be a simple amendment which the Court can effect on the record, without delaying the hearing of the Claim. Barring other disclosures by the Respondent, the **Court Orders:-**

a. *The Preliminary Objection is rejected.*

- b. *The Record is amended, indicating the name of the Respondent as Carslake Nominee Limited t/a Diani Sea Resort instead of Diani Sea Resort t/a Carslake Nominee Limited.*
- c. *Parties to schedule the main dispute for hearing.*
- d. *No order on the costs.*

Dated and delivered at Mombasa this 25th day of September, 2015

James Rika

Judge